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# Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1298

NICK MICHAEL, PETITIONER,

*versus*

UNITED STATES OF AMERICA, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

CHARLES PORTER,
Post Office Box 11588,
Columbia, South Carolina,
29211,
GLENN, PORTER & SULLIVAN,
P. A.,
Counsel for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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# Supreme Court of the United States

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No. .....

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NICK MICHAEL, PETITIONER,

*versus*

UNITED STATES OF AMERICA, RESPONDENT

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

---

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on March 17, 1975, which affirms per curiam the petitioner's conviction in the district court.

### OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, not yet reported, appears as Appendix A hereto. No opinion was rendered by the district court.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 17, 1975. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

## QUESTIONS PRESENTED

1. Was the hearsay evidence received in this case admissible in light of the confrontation clause of the Sixth Amendment of the United States Constitution where the hearsay was crucial and unreliable?

2. Was there sufficient independent evidence of the petitioner's participation in a conspiracy to permit the admission of the evidence of crucial and unreliable hearsay testimony under the federal co-conspirator exception to the hearsay rule?

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

## STATEMENT OF THE CASE

The petitioner was convicted of violating the federal criminal conspiracy statute, 18 U. S. C. § 371, in an indictment charging that he conspired with others to maliciously destroy Jupiter Knitting Mills, which he owned, by dyna-

miting in violation of 18 U. S. C. § 844(i). The respondent adduced considerable testimony to show that the petitioner, among others, had a motive to cause the dynamiting of his plant in that he would be the recipient of the insurance proceeds. The question of motivation was hotly disputed at every turn. The respondent showed that the insurance had recently been increased, but the petitioner showed that this was done at the instance of the insurance company's agent. The respondent contended that the petitioner's business was failing, but the petitioner showed that he was accumulating assets, continuing to pay himself a large salary and paying off indebtedness during a period of cyclical downturn in the double knitting industry. He further showed that he had an excellent reputation in the knitting industry and had been operating at full capacity up until the time of the explosion. A lucrative offer to purchase his plant was pending at the time it was destroyed.

Whatever the merits of the dispute over the issue of motivation, the heart of the matter is that one Ralph Cobb, an unindicted co-conspirator testified for the respondent that he and the petitioner's co-defendant Franklin D. Golden procured the wire, dynamite and caps (T. 146-147, 148), personally went to Jupiter Knitting Mills (T. 155), entered it with keys possessed by the petitioner's co-defendant Golden (T. 152), and blew the plant down (T. 156-157). It was his testimony that the petitioner's co-defendant Golden paid him $2,500.00 for his part in the crime. (T. 193.) This witness also testified that during the course of his dealings with the petitioner's co-defendant Golden, Golden, on several occasions, told him that the petitioner had made certain statements. Cobb recited these hearsay statements. Following each recitation, the Court admonished the jury that they were not admissible against the

petitioner **at that time**. The hearsay statements in question are as follows:

1. Cobb testified that the petitioner's co-defendant Golden told him that the petitioner said he would not help Cobb borrow money (T. 142).

2. Cobb testified that the petitioner's co-defendant Golden thereafter told him that the petitioner said he wanted Jupiter Knitting Mills blown up and he (Cobb) would be paid $2,500.00 to do it (T. 145).

3. Cobb testified that the petitioner's co-defendant Golden told him that the petitioner had said they didn't have enough dynamite, they needed to get more to blow up the plant (T. 147).

4. Cobb testified that the petitioner's co-defendant Golden told him that the petitioner said for them to get ready because they could blow up the plant at any time now (T. 149).

5. Cobb testified that the petitioner's co-defendant Golden told him that the petitioner had given him a set of keys to the plant (T. 152).

6. Cobb testified that the petitioner's co-defendant Golden told him that the petitioner said he didn't want the yarn burned, just the machinery crushed in the explosion (T. 158).

7. Cobb testified that the morning following the explosion, the petitioner's co-defendant Golden told him that the petitioner had said they had done a good job (T. 159).

8. Cobb testified that the petitioner's co-defendant Golden also later told him that he (Golden) would have to see the petitioner to get the money and that the petitioner would have to borrow the money (T. 189).

9. Cobb testified that later when the petitioner's co-defendant Golden brought money to him, he (Golden) told him that the petitioner had borrowed the money and given it to him (Golden) (T. 193).

The petitioner's co-defendant Golden was separately represented at trial and did not testify. The unindicted co-conspirator Cobb was granted complete immunity by the respondent in exchange for his testimony.

Another unindicted co-conspirator, Walter Elliott, testified that the petitioner's co-defendant Golden told him that the petitioner had called him from Greece and that he had to go to the office of Jupiter Knitting Mills to talk with the petitioner (T. 321). Elliott testified that the petitioner's co-defendant Golden told him that during the telephone conversation the petitioner had said not to blow the plant up now, he had some orders he wanted to fill (T. 322). The court again admonished the jury that this was hearsay as to the petitioner. The respondent presented extensive testimony concerning this telephone call and made it one of the major issues in the case (T. 424-425). There was no direct evidence of the contents of this telephone conversation except that an employee of the petitioner testified that immediately following the call, the petitioner's co-defendant Golden had explained that the petitioner had called to see if his cattle, which he had left in the care of his co-defendant Golden, were being properly cared for. The petitioner testified in his own behalf and denied any connection with the conspiracy. He gave the same explanation of the telephone call as his employee had given. He also explained that his co-defendant Golden would have had keys to the plant because he was a former employee.

The respondent frankly conceded that it had no direct evidence from any witness that the petitioner (Michael) participated in the alleged conspiracy or dynamiting (T. 167-168). The district court expressed grave misgivings about allowing the case to be submitted to a jury (T. 161-163, 530). In the trial court, as in the court below, the respondent was unable to point to anything that the petitioner ever said or did that made him a participant in the conspiracy. Instead, they have always contended broadly that the surrounding circumstances show his participation.

Despite the obvious importance of the questions presented, the court below affirmed the petitioner's conviction without itself finding any independent evidence of the petitioner's participation.

## REASONS FOR GRANTING THE WRIT

1. a. **The petitioner's conviction cannot be squared with the Sixth Amendment of the United States Constitution because the hearsay evidence received by the trial court denied the right of confrontation.**

The petitioner's conviction cannot be squared with the confrontation clause of the Sixth Amendment of the United States Constitution and therefore cannot stand *Edwards v. South Carolina*, 372 U. S. 229 (1963).

A strikingly similar case has arisen under the Sixth Amendment in the United States Court of Appeals for the Fifth Circuit, *Park v. Huff*, 493 F. 2d 923 (5th Cir. 1974), *reversed following rehearing en banc*, 506 F. 2d 849 (5th Cir. 1975). A petition for a writ of certiorari is now pending before this Court No. 74-1266. Although in *Park, supra*, it is contended that questions of state law influenced the decision, that consideration is not present in this case. The opinion of the original panel and the dissenting opinions on rehearing en banc express very strongly the views put forth by petitioner concerning the Sixth Amendment. Petitioner has no problems concerning underlying state law. The dissenting opinion in *Park, supra*, points out that the lack of any independent evidence to show that the defendant participated in a conspiracy had permitted the defendant to be found guilty on the basis of crucial, devastating, out-of-court statements of people who were never brought to testify. The dissenting opinion concludes:

> "I doubt that this could happen in any other civilized country. I had thought that it could not happen here." 506 F. 2d 849 at 863.

Taking all of the evidence produced by the respondent, it is fair to say that they were never able to show any act on the part of the petitioner to connect him with the conspiracy. The respondent, throughout the trial, argued that the totality of circumstances showed the petitioner's involvement. An analysis of the totality of the circumstances, however, shows nothing more than that the petitioner had a possible motive to have participated in the conspiracy.

The two witnesses for the respondent who actually participated in the conspiracy and destruction of the knitting mill, Elliott and Cobb, never had any contact with the petitioner regarding this case and could only testify to hearsay as related to them by the petitioner's co-defendant Golden.

The statement of the questions in this case are clarified by this Court's language in *California v. Green,* 399 U. S. 149, 155-156 (1970):

> "While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception. See Barber v. Page, 390 U. S. 719, 88 S. Ct. 1318, 20 L. Ed. 2d 255 (1968); Pointer v. Texas, 380 U. S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The converse is equally true: merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion

that confrontation rights have been denied.'" (Footnotes omitted.)

Therefore, if the admission of hearsay evidence in the present case violated either the federal hearsay rule or the confrontation clause of the Sixth Amendment, the conviction cannot stand.

It may well be that the federal hearsay rule would exclude evidence that would not fall afoul of the Sixth Amendment's confrontation clause. This Court in *Dutton v. Evans*, 400 U. S. 74, 82 (1970) made this clear when it said:

> ". . ., the limits of this hearsay exception have simply been defined by the Court in the exercise of its rule-making power in the area of the federal law of evidence.[13] It is clear that the limited scope of the hearsay exception in federal conspiracy trials is a product, not of the Sixth Amendment, but of the Court's 'disfavor' of 'attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions.' Grunewald v. United States, 353 U. S. 391, 404, 77 S. Ct. 963, 974, 1 L. Ed. 2d 931." (Footnotes omitted.)

Conversely, it would seem that if the evidence in question is inadmissible under the Sixth Amendment's confrontation clause, the inquiry is ended because it could not possibly be otherwise admissible.

In *Dutton, supra,* at pages 88-89, this Court indicated that the admissibility of hearsay testimony was to be tested in light of its reliability and that if it lacked reliability it was a denial of the right to be confronted by the witnesses as mandated by the Sixth Amendment. The discussion of the indicia of reliability begins at page 88. The factors which this Court considered in *Dutton, supra,* are:

1. Whether or not the hearsay statement contains an express assertion about past fact. There it did not, but here it does.

2. Whether or not the declarant was in a position to have personal knowledge of the identity and role of other participants. There it was clear that he did; here, although the declarant did know the petitioner, there was no compelling reason to accept the assertions as true. If every hearsay statement in the present case were a total fabrication by the declarant, it would not be inconsistent with any part of the record, and here, since the petitioner is not claimed to have participated in the crime as had Evans, the subject of the hearsay is conspiracy, not participation.

3. Whether or not it was likely that the declarant's statements were founded on faulty recollection. *Dutton v. Evans,* 400 U. S. 74 (1970) found that possibility to be extremely remote. It must be conceded that it is also unlikely that the declarant Golden's statements in this case were founded on faulty recollection, if made.

4. Whether or not the hearsay statements were made under such circumstances as to give reason to suppose that they were a misrepresentation. In *Dutton, supra,* this Court found no apparent reason to lie and that the statements were spontaneous and against the declarant's penal interest. In the present case, the declarant Golden may well have wished to lie in order to make the scheme more plausible and its chances of success more likely by attributing to it the imprimatur of the supposed victim. Further, the statements of the declarant were anything but spontaneous or against his penal interest. It cannot be said here, as it was by this Court in *Dutton, supra,* that it is wholly unreal to think that cross examination of the declarant might have shown that the hearsay statements were unreliable. To the contrary, should the declarant Golden be subjected to cross examination in a trial against petitioner, it is not unlikely that he would deny having made the statements attributed to him, or repudiate their truth if he did make them, or be

unable to make any convincing explanation of why the petitioner would have done the bizarre, unreasonable, self-feating and improbable things attributed to him by those hearsay statements. It is, as this Court said in *Dutton v. Evans,* 400 U. S. 74 (1970) the mission of the confrontation clause to advance a practical concern for the accuracy of the truth determining process in criminal trials by assuring that the trier of fact has a satisfactory basis for evaluating the truth of the prior statement. In the present case, the only satisfactory basis for evaluating the truth of the statements attributed to Golden would be through his cross examination, because there is in this case serious question whether the statements were ever made and whether, if they were made, they were deliberate falsifications.

In *Bruton v. United States,* 391 U. S. 123, 126 (1968), this Court held that:

> ". . . because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse."

The exact same evil exists in this case though in a slightly different form. Here the jury was instructed throughout the trial to disregard the hearsay as to the petioner, an instruction which is obviously ineffective as *Bruton, supra,* indicates. At the conclusion of the trial the jury is then told that they are to determine whether or not they should consider the hearsay that was "crucial", "devastating" and permeated the trial. It is wholly unreal to suppose that the jury ever did anything except to accept the hearsay statements at face value throughout the trial in light of the fact that the truth of the assertions went un-

challenged because cross examination was unavailable. If *Bruton v. United States,* 391 U. S. 123 (1968) found it unreasonable to assume that a jury would follow an instruction to disregard the confession of a co-defendant, it is equally unreasonable to think that they followed the court's repeated instructions in this case to disregard the hearsay as to the petitioner, particularly when the final instruction told them that under certain stated conditions they might consider these same statements. Both in *Bruton, supra,* and the present case the declarant/co-defendant did not testify. In *Bruton, supra,* this Court observed at page 128:

> "Evans' confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross examination, since Evans did not take the stand. Petitioner thus was denied his constitutional right of confrontation."

That exact statement applies to the hearsay statements attributed to the petitioner's co-defendant Golden, who did not testify in the present case. As this Court also said in *Bruton, supra,* at page 136:

> "Not only are the incriminations devastating to the Defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others.[11] The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross examination. It was against such threats to a fair trial that the Confrontation Clause was directed.[12]" (Footnotes omitted.)

The excuse for admitting the confession in *Bruton v. United States,* 391 U. S. 123 (1968) which incriminated the co-defendant Bruton was that a curative instruction was given to the jury. The excuse for the admission of crucial

and devastating hearsay evidence in this case is the federal co-conspirator exception to the hearsay rule. This is a theory founded on agency. The exact point is discussed under Argument 1.b., but it should be noted in passing that the theory of admissibility in this case does nothing to advance the truth determining process and, in fact, rests on the faulty premise that there was independent evidence of agency to justify the use of the theory. *Douglas v. Alabama,* 380 U. S. 415 (1965) is to the same effect.

This Court's prior decisions make it clear that a trial where the only evidence against the petitioner was adduced from an alleged co-defendant who never took the witness stand cannot be squared with the Sixth Amendment of the United States Constitution.

1. b. **The court below misapplied the federal co-conspirator exception to the hearsay rule by permitting the admission of crucial and unreliable hearsay testimony without any independent evidence of the petitioner's participation in a conspiracy.**

There was no independent evidence of the petitioner's participation in a conspiracy. The decision below is shockingly wrong, *Thompson v. City of Louisville,* 362 U. S. 199 (1960), and presents an obvious misapplication of the federal co-conspirator exception to the hearsay rule as defined by the applicable decisions of this Court.

The requirement of proof of a defendant's participation in a conspiracy to satisfy the federal co-conspirator exception to the hearsay rule is that the evidence of participation be substantial and independent of hearsay. *United States v. Nixon,* 418 U. S. 683, 700-701, n. 14 (1974). *See also, United States v. Bentvena,* 319 F. 2d 916 (2nd Cir. 1963), *cert. denied,* 375 U. S. 940 (1964).

This Court pointed out in *Glasser v. United States,* 315 U. S. 60, 74-75 (1942) regarding hearsay:

> "However, such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Minner v. United States, 10 Cir., 57 F. 2d 506; and see Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286. Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

The present case is a classic instance of "bootstrap" conspiracy because in this case the hearsay was devastating, crucial and extensive. Without it there literally is no case at all against the petitioner. The respondent here accomplished exactly what *Glasser v. United States,* 315 U. S. 60 (1942) prohibits under the federal co-conspirator exception to the hearsay rule.

Good general discussions of the problem are found in Davenport, THE CONFRONTATION CLAUSE AND THE CO-CONSPIRATOR EXCEPTION IN CRIMINAL PROSECUTIONS: A FUNCTIONAL ANALYSIS, 85 Harv. L. Rev. 1378 (1972); and Levie, HEARSAY AND CONSPIRACY: A REEXAMINATION OF THE CO-CONSPIRATORS' EXCEPTION TO THE HEARSAY RULE, 52 Mich. L. Rev. 1159 (1954).

The parameters of conspiracy need no further expansion. *Krulewitch v. United States,* 336 U. S. 440 (1949). *Grunewald v. United States,* 353 U. S. 391 (1957).

There is nothing except proof of motive in this case. This is patently insufficient and the conviction should not be allowed to stand.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

CHARLES PORTER,
Post Office Box 11588,
Columbia, South Carolina,
29211.

April, 1975.

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## APPENDIX A

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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**No. 74-2011**

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UNITED STATES OF AMERICA, APPELLEE,

*versus*

NICK MICHAEL, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AT SPARTANBURG
J. ROBERT MARTIN, JR., CHIEF JUDGE

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Argued March 6, 1975 Decided March 17, 1975

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Before WINTER, CRAVEN and RUSSELL
Circuit Judges

Charles Porter (Ward, Howell, Barnes and Long, and Glenn, Porter and Sullivan, P. A. on brief) for Appellant; Thomas P. Simpson, Assistant United States Attorney (John K. Grisso, United States Attorney, on brief), for Appellee.

PER CURIAM:

From our examination of the record and consideration of the briefs and oral argument, we are persuaded that the government offered evidence sufficient to permit the jury to find beyond a reasonable doubt that defendant joined the conspiracy to blow up Jupiter Mills, and that as a consequence the hearsay statements of his co-conspirators were admissible in evidence against him consistent with the rules of evidence and not in derogation of his sixth amendment right to confrontation.

AFFIRMED.

# United States Court of Appeals

FOR THE FOURTH CIRCUIT

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**No. 74-2011**

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UNITED STATES OF AMERICA, APPELLEE,

*versus*

NICK MICHAEL, APPELLANT

Appeal from the United States District Court for the ..... District of ..... South Carolina.

This cause came on to be heard on the record from the United States District Court for the ..... District of ..... South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ WILLIAM K. SLATE, II,
Clerk.

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk.

By /s/ WILLIAM CARPENTER,
Deputy Clerk.

# In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1298

NICK MICHAEL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner contends that the co-conspirator exception to the hearsay rule violates the Sixth Amendment and that there was insufficient evidence that petitioner participated in the conspiracy.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring maliciously to destroy by means of an explosive property used in interstate commerce, and of the substantive offense, in violation of 18 U.S.C. 2, 371, and 844(i).[1] He was sentenced to concurrent terms of five and seven years' imprisonment. The court of appeals affirmed (Pet. App. A).

[1]Co-defendant Franklin D. Golden was convicted of the same charges. Golden was sentenced to concurrent terms of five years' imprisonment. He did not appeal his conviction and is not a party to this petition.

1. The evidence introduced at trial (now taken, together with all legitimate inferences, in the light most favorable to the government) showed that the entire stock of Jupiter Mills, which produced double knit cloth on a contract or commission basis, was owned by petitioner, his wife, and their two children (Tr. 666-671). Jupiter Mills lost $32,138 in the fiscal year ending October 31, 1972 (Tr. 25). Between July and August 1972, eight knitting machines were delivered to Jupiter Mills (Tr. 54). However, by July 1973 only two of the machines had been paid for.

On November 2, 1972, Jupiter Mills increased the insurance coverage on its machinery and the other contents of its buildings from $470,000 to $1,000,000. The insurance coverage on its buildings was also increased to $250,000 (Tr. 73).

In April 1973, Franklin D. Golden, a former employee of Jupiter Mills, told Walter Elliott that petitioner wanted his "place" blown up. According to Golden, petitioner agreed to pay $5,000 for the job. Elliott agreed to help Golden perform this job in return for half of the $5,000 (Tr. 315-316, 677). Golden told Elliott that the plan was to destroy a wall so that a portion of the concrete roof would collapse onto certain machines, but that another part of the plant was not to be destroyed because petitioner wanted to use the yarn that was stored there (Tr. 317).

Later, Golden told Elliott that petitioner had telephoned from Greece and had instructed them to delay the plan because petitioner wanted to fill some orders (Tr. 321-322). On April 2, petitioner telephoned Jupiter Mills and asked to speak with Golden, who could not be reached. Petitioner then asked that Golden be at the office at noon on the following day. On April 3, petitioner again telephoned and spoke with Golden (Tr. 402-404, 691-693).

In late May or early June 1973, Golden told Ralph Cobb that petitioner wanted Jupiter Mills blown up. Golden advised Cobb that he would receive $2,500 if he obtained some dynamite (Tr. 145-146). Several days later, Cobb gave Golden seven sticks of dynamite. Golden told Cobb, two or three days later, that petitioner had said that more dynamite was needed (Tr. 146-147). Cobb then acquired an additional ten sticks of dynamite (Tr. 147-148).

On about July 13, 1973, petitioner had his car serviced at a gas station where Golden and Cobb worked. After servicing petitioner's car, Golden told Cobb that petitioner had told him to blow up the plant whenever he was ready (Tr. 137, 149-152). Golden also showed Cobb a set of keys for Jupiter Mills, which he claimed petitioner had given him (Tr. 152). The following day, Golden and Cobb set off the dynamite, destroying a wall at Jupiter Mills and causing a portion of the roof to collapse onto a number of knitting machines (Tr. 155-157, 470-473). At the time of the explosion, six of the new machines were still not paid for (Tr. 62-63).

The day after the explosion, Cobb observed petitioner speaking with Golden for about ten or fifteen minutes. When petitioner left, Golden told Cobb that petitioner had said that they had done a "damn good job" (Tr. 159). Golden gave Cobb $1,031 for his part in the affair, explaining that petitioner had provided the money (Tr. 193).

2. Petitioner argues that there was not sufficient non-hearsay evidence connecting him to the conspiracy and, therefore, that it was error for the district court to allow the jury to consider the hearsay declarations of others.

There is, at least verbally, a conflict among the circuits concerning the quantum of nonhearsay evidence linking an accused to a conspiracy that must be introduced before the jury may be permitted to consider hearsay declarations. The Second and Third Circuits hold that hearsay may be considered if a "fair preponderance" of the nonhearsay evidence indicates membership in the conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028; *United States* v. *Bey*, 437 F.2d 188 (C.A. 3). Other courts of appeals have held or intimated that the nonhearsay evidence of participation in the conspiracy must by itself be sufficient to allow a case to go to the jury before hearsay may be considered against a defendant. See *United States* v. *Johnson*, 467 F.2d 804, 807 (C.A. 1), certiorari denied, 410 U.S. 909; *United States* v. *Morton*, 483 F.2d 573, 576 (C.A. 8); *Rizzo* v. *United States*, 304 F.2d 810, 826 (C.A. 8). Cf. *United States* v. *Nixon*, 418 U.S. 683, 701, n. 14. Still other circuits are undecided.[2]

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[2]Compare *Carbo* v. *United States*, 314 F.2d 718, 737 (C.A. 9), certiorari denied, 377 U.S. 953, with *United States* v. *Spanos*, 462 F.2d 1012 (C.A. 9). A panel of the Fifth Circuit has held that the nonhearsay evidence should be sufficient to permit the case to the jury. *United States* v. *Oliva*, 497 F.2d 130, 132-133. But in a recent *en banc* case the court held that, at least for purposes of *habeas corpus* to review a state conviction, all that is required is "independent evidence of a concert of action" establishing a "likelihood" of participation in the conspiracy (*Park* v. *Huff*, 506 F.2d 849, 859). *Park* did not refer to *Oliva*. The Fourth Circuit previously had held that there must be "prima facie proof of the conspiracy" (*United States* v. *Vaught*, 485 F.2d 320, 323), without specifying whether that proof must be convincing beyond a reasonable doubt or only by a preponderance of the evidence. See also *United States* v. *Hoffa*, 349 F.2d 20, 41 (C.A. 6), affirmed on other grounds, 385 U.S. 293; *United States* v. *Santos*, 385 F.2d 43, 45 (C.A. 7).

It may be that this conflict is illusory, and that the courts of appeals decide cases consistently in spite of their verbal differences. There is, in any event, no need for the Court to decide in this case whether it is necessary to undertake to resolve the conflict. The court of appeals here concluded that there was "evidence sufficient to permit the jury to find beyond a reasonable doubt that [petitioner] joined the conspiracy to blow up Jupiter Mills, and that as a consequence the hearsay statements * * * were admissible" (Pet. App. 17). The court of appeals apparently applied—and found that the evidence satisfied—the most rigorous standard.

Nonhearsay evidence in the record shows that petitioner increased the insurance coverage on his machines five months before Golden and Cobb began their roles in the conspiracy to blow up those machines (Tr. 73, 315-317), that petitioner telephoned Golden at the approximate time Golden told Cobb that petitioner had instructed them to postpone the plan to dynamite a portion of Jupiter Mills (Tr. 321-322, 403), and that petitioner spoke with Golden just before Golden told Cobb that petitioner had instructed them to carry out the plan whenever they were ready (Tr. 155-158). Nonhearsay evidence also demonstrated that after the explosion, petitioner and Golden spoke to each other just before Golden told Cobb that petitioner had said that they had done a "damn good job" (Tr. 159). This evidence, when combined with evidence that Jupiter Mills was losing money, established both a motive for participation in the conspiracy and some degree of concert among petitioner, Golden and Cobb. Under established standards, this was sufficient circumstantial evidence to permit the jury to infer that petitioner was a

member of the conspiracy. See *United States* v. *Pennett*, 496 F.2d 293, 295-296 (C.A. 10); *United States* v. *Moraites*, 456 F.2d 435 (C.A. 3); *United States* v. *Perillo*, 164 F.2d 645 (C.A. 2).[3]

3. Petitioner argues that the co-conspirator exception to the hearsay rule prevented him from confronting and cross-examining the witnesses against him and therefore violates the Sixth Amendment. The argument is unavailing. *Dutton* v. *Evans*, 400 U.S. 74, 77-78, 88-90, held that the right to confront and cross-examine was not violated by a Georgia co-conspirator exception that allowed into evidence a co-conspirator's out-of-court statement made during the concealment phase of the conspiracy. *A fortiori*, the federal co-conspirator exception, which allows into evidence only statements during the active phase of the conspiracy, is constitutional. Cf. *United States* v. *Nixon*, *supra; Lutwak* v. *United States*, 344 U.S. 604, 617.

4. Petitioner finally contends that Golden's statements lacked the indications of trustworthiness relied upon in *Dutton*. But Golden's statements had sufficient indicia of trustworthiness. It was against Golden's penal interest to state that petitioner wanted his machinery destroyed and that he was willing to pay $5,000 for the job; these statements tended to establish Golden's purpose and motive in joining the conspiracy (Tr. 145-146, 155-158, 315-316). Golden was directly implicated in the conspiracy by his out-of-court statements that petitioner had said that more dynamite was needed, that petitioner had given him keys to the plant, that petitioner wanted Golden to postpone the explosion, and that petitioner had told him he had done a good job (Tr. 146-147, 152, 159, 321-322).

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[3]Petitioner asserts that there is a similarity between the facts in the instant case and those in *Park* v. *Huff*, 493 F.2d 923 (C.A. 5), reversed following rehearing *en banc*, 506 F.2d 849, petition for writ of certiorari pending, No. 74-1266. *Park* held that there was sufficient independent circumstantial evidence to invoke the Georgia co-conspirator exception to the hearsay rule (506 F.2d at 858-859). The court also held that the co-conspirator exception did not violate the right to confrontation (506 F.2d at 861). Accordingly, *Park* supports the decision of the court below.

Moreover, Golden spoke from personal knowledge about what petitioner had told him, and it is thus less likely that Golden's statements were subject to faulty recollection. See Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957 (1974). Golden had no motive to lie when he told Cobb that petitioner was pleased with their performance. Petitioner argues that Golden had a motive to lie when he initially told Cobb and Elliott that petitioner wanted his building dynamited, because petitioner's participation might persuade them to join in the conspiracy. But there is no basis in the record to suggest that Golden had his own reasons for dynamiting a portion of Jupiter Mills. It is therefore pure speculation that Golden had this, or any other, motive to lie. The jury was instructed, properly, that it must evaluate Golden's memory and credibility. It did so, and it did not find them wanting. Petitioner has had a fair trial.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JUNE 1975.